TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 975.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ONE HUNDRED AND FIFTY BARRELS OF WHISKY, JOSEPH ROELLE, ANTON JUNKER, AND JOHN P. KISSINGER, CLAIMANTS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 12, 1878.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Monday, the thirtieth day of September, in the year of our Lord one thousand eight hundred and seventy-eight and of our independence the one hundred and third year.

WILLIAM H. BRADLEY, *Clerk.*

THE UNITED STATES OF AMERICA
v.
ONE HUNDRED AND FIFTY BARRELS OF WHISKEY and One Hundred Barrels of Alcohol.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-fifth day of July, A. D. 1878, came the said plaintiff, the United States of America, by Mark Bangs, attorney of the United States for the northern district of Illinois, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illnois, at Chicago, in the district aforesaid, a transcript of the record of the proceedings had in the district court of the United States for said district, which said transcript is in the words and figures following, to wit:

2

Transcript of record.

3 Pleas in the district court of the United States in and for the northern district of Illinois, held in the city of Chicago, at the United States court rooms, before the Hon. Henry W. Blodgett, district judge, on the 12th day of June A. D. 1878.

THE UNITED STATES OF AMERICA,
v.
150 BARRELS OF WHISKEY AND 100 BARRELS of Alcohol.

Information.—Filed May 17th, 1875.

Be it remembered that on this 17th day of May, in the year of our Lord eighteen hundred and seventy-five, J. D. Ward, attorney of the United States for the northern district of Illinois, comes into the district court of the United States of America for the northern district of Illinois, and in the name and on behalf of the United States of America gives the said court here to understand and be informed that heretofore, to wit, on the thirteenth day of May, in the year of our Lord eighteen hundred and seventy-five, to wit, at Chicago, in the northern district of Illinois, within the jurisdiction of this honorable court, one Phillip Wadsworth, who then and there was the collector of internal revenue of the United States for the first collection district of the State of Illinois, did seize as forfeited to the use of the said United States the goods, wares, and merchandise following, that is to say,

4 150 barrels of whiskey, containing 6,450 galls.
100 " " alcohol " 7,900 "

and now hath the same in his custody as being forfeited for the causes hereinafter mentioned, to wit:

For that at the time of said seizure, to wit, at Chicago, within said district, said distilled spirits and rectified spirits, alcohol, were found

by the said Philip Wadsworth, collector, in the possession and custody and within the control of a person or persons to the said attorney unknown, for the purpose of being sold and removed by such person or persons in fraud of the internal revenue laws, and with design to avoid payment of the taxes thereon, contrary to the form of the statutes of the said United States in such case made and provided, whereby and by force of said statutes the said distilled spirits and rectified spirits and alcohol have become and are forfeited to the said United States.

For that at the time of said seizure and long prior thereto, to wit, at Chicago, within said district, the said distilled spirits and alcohol were owned by a person or persons, firm or corporation, to said attorney unknown, which said person or persons, firm or corporation, then and there and long prior thereto, engaged in and carried on the business of a distiller, with intent to defraud the United States of the tax on the spirits and alcohol distilled by such person or persons, firm or corporation, contrary to the form of the statute of the said United States in such case made and provided, whereby and by force of said statute the said distilled spirits and alcohol have become and are forfeited to the said United States.

For that at the time of said seizure, to wit, at Chicago, within said district, said distilled spirits and alcohol were found elsewhere
5 than in a distillery and distillery warehouse, not having been removed therefrom according to law, contrary to the form of the statute of the said United States in such case made and provided, whereby and by force of said statute the said distilled spirits and alcohol have become and are forfeited to the said United States.

And, therefore, and by reason of all and singular the premises aforesaid, the said attorney of the United States, on behalf of the United States, prays the said court that due process issue to enforce the said forfeiture of said property so seized as aforesaid, and to give notice to all persons concerned in interest to appear and show cause, on the return day of said process, why such forfeiture should not be decreed.

J. D. WARD,
Attorney of the United States for the Northern Dist. of Ill's.

And thereupon a monition issued out of said clerk's office of said court which, together with the marshal's return thereon endorsed, reads in the words and figures following, to wit:

(Filed July 31, 1876.)

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas an information has been filed in the district court of the United States in and for the northern district of Illinois, on the 17th day of May, in the year of our Lord one thousand eight hundred and seventy-five, by J. D. Ward, attorney of the United States for said district, and in the name and on behalf of the United States of
6 America, against One hundred and fifty Barrels of Whiskey, containing 6,450 gallons, and One hundred Barrels of Alcohol, containing 7,900 gallons, for reasons and causes in said information, and praying the usual process and monition of the said court in that behalf to be made, and that all persons having or pretending to have any right, title, or interest therein may be cited to appear and answer all and sin-

gular the matters in said information articulately propounded; and that this court would be pleased to pronounce condemnation and forfeiture of said property, the damages alleged in said information, besides costs of suit.

You are, therefore, commanded to attach the said One hundred and fifty Barrels of Whiskey, containing 6,450 gallons, and One hundred Barrels of Alcohol, containing 7,900 gallons, and to detain the same in your custody until the further order of the court respecting the same, and to give notice, by publication for fourteen days previous to the day of trial, and by notice posted up in the most public manner for the space of fourteen days, at or near the place of trial, of seizure, and libel, to all persons claiming the said property, or knowing or having anything to say why this court should not pronounce against the same according to the prayer of the said information, and that they be and appear before the said court to be holden in and for the northern district of Illinois at the United States court-room in the city of Chicago, in said district, on the first Monday in June next, if that be a day of jurisdiction; if not, then on the first day of jurisdiction thereafter, at 10 o'clock in the forenoon of that day, and then and there to interpose a claim to the same, and to make their allegations in that behalf. And what
7 you shall have done in the premises do you then and there make return together with this writ.

Witness the honorable Henry W. Blodgett, judge of said court, this 17th day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 99th year.

[L. S.] W'M H. BRADLEY, *Clerk.*

Marshal's return.

By virtue of the within monition, I seized the property herein named on the seventeenth day of May, A. D. 1875, and afterwards, on the same day, I released said property by order of the U. S. district court. I also gave notice to all parties, as I am herein commanded.

B. H. CAMPBELL,
U. S. Mar.,
By T. R. BIRD,
Deputy.

And afterwards, to wit, on May 17th, 1875, the following appraisements were filed, in the words and figures following, to wit:

UNITED STATES INTERNAL REVENUE
COLLECTOR'S OFFICE, DISTRICT ILLINOIS,
Chicago, May 17th, 1875.

Appraisement of 150 barrels of whiskey, the property of Roelle, Younker & Co., in warehouse, corner Kinzie & Rush st., in charge of H. N. Rust; appraised per order of Philip Wadsworth, collector 1st dist. Ills.: 150 bbls. whiskey, containing 6,450 gall., @ 1.20 per gall., $7,740.00.

LEONARD C. STEBBINS.
B. M. FORD.
H. A. PLIMPTON.

8 UNITED STATES INTERNAL REVENUE
COLLECTOR'S OFFICE, DISTRICT ILLINOIS,
May 17th, 1875.

Appraisement of 100 barre's of alcoh ol, the property of Roelle, Younker & Co., in warehouse, corner Kinzie & Rush st., in charge of H. N. Rust;

appraisement per order of Phillip Wadsworth, collector first district Illinois: 100 bbls. alcohol, containing 7,900 galls., @ 1.16 per gall., $9,164.00.

LEONARD C. STEBBINS.
B. M. FORD.
H. A. PLIMPTON.

And afterward, to wit, on the 17th day of May, 1875, the following petition and claim was filed, which is in the words and figures following, to wit:

Petition and claim.

District court of the United States for the northern district of Illinois.

The claim and petition of Joseph Roelle, Anton Junker, and John P. Kissinger, composing the firm of Roelle, Junker & Co., in the matter of the information filed in behalf of the United States against one hundred barrels of alcohol, and one hundred and fifty barrels of whiskey, situate in H. N. Rust's warehouse, in Chicago, states as follows:

That the said Roelle, Junker & Co. are the true and bona fide owners of said alcohol and whiskey, which has been seized and is now in the custody and control of this court. That the business of said Roelle, Junker & Co. will suffer great derangement and injury, and the custody of said property seized will be attended with great expense, and
9 said property to great loss and depreciation by leakage and otherwise, unless the same be released upon a bond to be approved by this court; and your petitioners therefore pray that said property may be released upon execution of such bond.

ROELLE, JUNKER & CO.
JOSEPH ROELLE.
ANTON JUNKER.
JOHN P. KISSINGER.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Joseph Roelle, being duly sworn, says he is a member of the firm of Roelle, Junker & Co., the petitioners in the above petition named, that he has heard read said petition and knows the contents thereof, and that the same is true.

JOSEPH ROELLE.

Subscribed and sworn to before me May 17, 1875.

E. A. DRUMMOND,
U. S. Com'r.

And now, on the 17th day of May, 1875, the following order was entered and is in the words and figures following, to wit:

The marshal having returned on the monition issued herein, that he had attached and now had in his possession one hundred and fifty barrels of whiskey, containing six thousand four hundred and fifty gallons, and one hundred barrels of alcohol, containing seven thousand and nine hundred gallons, and Joseph Roelle, Anton Junker, and John P. Kissinger, composing the firm of Roelle, Junker & Co., having filed
10 their claim as the sole owners of said property so seized, and having petitioned the court that the same be released to them

upon giving bond in accordance with the practice of this court in revenue cases, and the court having appointed Leonard C. Stebbins, B. M. Ford, and H. A. Plimpton, to appraise said alcohol and whiskey, and the said appraisers having made their appraisement and returned the same into court, showing the value of said whiskey and alcohol to be in the aggregate sixteen thousand nine hundred and four dollars, and the said Joseph Roelle, Anton Junker, and John P. Kissinger, having presented in open court the usual bond for the release and delivery of said whiskey and alcohol in the sum of $33,808.00, which said bond is approved by the court and ordered to be filed in said case, and is in the words and figures following, to wit:

In the district court of the United States, northern district of Illinois.

Know all men by these presents that we Joseph Roelle, Anton Junker, and John P. Kissinger, composing the firm of Roelle, Junker & Co., principals, and Simon Powell and David G. Rush, sureties, are held and firmly bound unto the United States of America in the penal sum of thirty-three thousand eight hundred and eight dollars lawful money of the United States of America, to which payment well and truly to be made we bind ourselves and each of us jointly and severally firmly by these presents, dated and sealed with our seals this 17th day of May, A. D. 1875.

Whereas one hundred barrels of alcohol and one hundred and fifty barrels of whiskey, belonging to the said Roelle, Junker & Co., and situate in H. N. Rust's warehouse in Chicago, in said northern district of Illinois, have been seized and are now in the custody and under
11 the control of said court for alleged violations of the internal revenue laws of the United States, all of which said property has been appraised by appraisers appointed by the district court of the United States for the northern district of Illinois in the aggregate sum of sixteen thousand nine hundred and four dollars, as more fully appears by said appraisal and the proceedings therein on file in said court, and whereas the said Roelle, Junker & Co., as claimants of said property, are desirous of releasing the same from said seizure.

Now, therefore, the condition of this obligation is such that if the above-described property or any part thereof be adjudged to be forfeited by said district court or any court to which said cause may be removed, and if the above bounden Roelle, Junker & Co. shall pay to the proper officers of the United States or into the said district court the said full appraised value of said property, or of so much thereof as may be adjudged to be forfeited as aforesaid, then this obligation to be void, otherwise to remain in full force and effect.

And in case of failure to perform the above condition, and pay said appraised value, or of so much thereof as may be adjudged forfeited, we hereby consent and agree that a summary judgment and decree may be entered against us and each of us, without notice, for the said appraised value of the property forfeited, with interest thereon from date in accordance with the usual practice in proceedings for condemnation, and that execution may issue thereon against our goods, chattels, and land for the payment of said judgment and interest as aforesaid.

ROELLE, JUNKER & CO. [L. S.]
JOSEPH ROELLE. [L. S.]
ANTON JUNKER. [L. S.]
12 SIMON POWELL. [L. S.]
DAVID G. RUSH. [L. S.]

It is thereupon ordered by the court that said one hundred and fifty barrels of whiskey and said one hundred barrels of alcohol be delivered to said John Roelle, Anton Junker, and John P. Kissinger.

Answer.—Filed July 7th, 1875.

District court of the United States for the northern district of Illinois.

THE UNITED STATES
v.
ONE HUNDRED BARRELS OF ALCOHOL AND ONE hundred and fifty barrels of whiskey, Joseph Roelle, Anton Junker, & John P. Kissinger, claimants.

And now come Joseph Roelle, Anton Junker, and John P. Kissinger, claimants of the property heretofore seized in this cause, and whose claim thereto has been heretofore filed herein, and for answer to the information filed herein, say and propound as follows:

First. That it is not true as in the first article of said information is untruly alleged and pleaded.

Second. That it is not true as in the second article of said information is untruly alleged and pleaded.

Third. That it is not true as in the third article of said information is untruly alleged and pleaded.

Fourth. Wherefore the said respondents pray that the said property seized herein may be adjudged to be restored, and the said information dismissed.

13 E. JUSSEN & SIDNEY SMITH,
Att'ys for Claimants.

And now, to wit, April 6th, A. D. 1876, in the record of the proceedings of said court in said cause is the following entry, to wit:

UNITED STATES OF AMERICA
v.
ONE HUNDRED AND FIFTY BARRELS OF WHISKEY and one hundred barrels of alcohol.

Now comes the district attorney and also come Joseph Roelle, Anton Junker, and John P. Kissinger, claimants of the property and goods seized herein by Sidney Smith, esq., their attorney, and withdraw their appearance and answer herein. And thereupon proclamation was made for all parties having any claim, right, title, or interest in the property seized herein, to come forward and make the same known or default would be entered, and all persons failing to appear, it is thereupon considered by the court that the defaults of all persons be and they are hereby accordingly entered.

It is thereupon ordered, adjudged, and decreed by the court that the property and goods described in the information and seized herein, to wit, one hundred and fifty barrels of whiskey, containing 6,450 gallons, one hundred barrels of alcohol, containing 7,900 gallons, be and the same are hereby condemned and forfeited to the United States.

And it appearing to the court that the said property had been released to the claimants thereof, upon bond and stipulation given by them for the release of said goods and property aforesaid, and on motion of

14 the district attorney for judgment upon said bond, it is thereupon considered by the court that a summary judgment be and the same is hereby accordingly entered against Joseph Roelle, Anton Junker, and John P. Kissinger, as principals, and Simon Powell and David G. Rush, as sureties, in the sum of thirty-three thousand eight hundred and eight dollars, being the amount of the penalty of said bond given for the release of said property, and that execution issue therefor, to be satisfied and discharged upon the marshal making thereon the sum of sixteen thousand nine hundred and four dollars, being the appraised value of said property so released, together with interest thereon and costs herein.

15 And now, to wit, February 27th, A. D. 1877, in the record of the proceedings of said court in said cause is the following entry, to wit:

Now come the claimants of said property, by Leonard Swett, their attorney, and on his motion and with the consent of the district attorney, it is ordered by the court that the judgment of forfeiture against said property and the judgment on the bond for the release of the same, entered on the sixth day of April last, be so far opened for the purpose only of allowing said claimants to interpose their several defenses, with the understanding and agreement upon their part that the lien of said judgment remain unchanged.

And now, to wit, May 16th, 1877, in the record of the proceedings of said court in said cause is the following entry, to wit:

Now come the parties by their attorneys, and on motion of the district attorney, it is ordered by the court that the order opening the judgment heretofore entered herein be set aside, and that said judgment stand in full force herein.

And now, to wit, on the 6th day of August, A. D. 1877, the following stipulation is filed, which is in the words and figures following, to wit:

In the United States district court for the northern district of Illinois.

16 THE UNITED STATES OF AMERICA
v.
ONE HUNDRED AND FIFTY BARRELS OF whiskey and other property.

It is hereby stipulated by Joseph Roelle, Anton Junker, and John P. Kissinger, claimants of the property in said cases, that they will make an immediate attempt to have said cases compromised and settled by the departments at Washington, and that in case the said departments refuse or decline to settle and compromise the same, the said claimants will not require the said United States to prove the original causes of action or liabilities of the said claimants, but that on the trial of said causes the said claimants will admit the original causes of action and liabilities, and will not interpose any defense or defenses except the agreement made with them when the said Roelle and Junker turned state's evidence and became witnesses for the government. Said cases are to be

tried or disposed of during the next term of said court and all liens being reserved.

CHARLES H. REED,
Attorney for Claimants.

AUGUST 6th, 1877.

I hereby protest that the said agreement affords the said defendants no defense in said suits.

MARK BANGS,
U. S. Attorney.

(Indorsed:) Filed June 12th, 1878. Wm. H. Bradley, clerk.

17 And thereupon said defendants, by C. H. Reed, esq., their attorney, move the court to open said judgment, and for leave to interpose their defense therein.

And now, to wit, July 7th, A. D. 1877, in the record of the proceedings of said court in said cause, is the following entry, to wit:

On motion of claimants, by Charles H. Reed, esq., their attorney, it is ordered by the court that execution herein be stayed until the sixth day of August next.

And now, to wit, August 6th, A. D. 1877, in the record of the proceedings of said court in said cause, is the following entry, to wit:

Now comes the district attorney, and the said respondents come also by Edmund Jussen and Chas. H. Reed, their attorneys, and the court having considered and being now fully advised upon the motion of said respondents to set aside the judgment heretofore entered herein, to wit, on the sixth day of April, A. D. 1876, against the said Joseph Roelle, Anton Junker, and John P. Kissinger as principals, and Simon Powell and David G. Rush as sureties, upon the bond heretofore given for the release of said property, orders that the same be so far opened as to allow the said respondents to make their defense, but preserving the lien created by said judgment and the execution issued thereon.

And it is further ordered that the marshal take no further action towards the collection of said judgment upon said execution until the further order of the court.

18 And now, to wit, November 15th, A. D. 1877, in the record of the proceedings of said court in said cause, is the following entry, to wit:

Now come the district attorney, and now come also Joseph Roelle, Anton Junker, and John P. Kissinger, the claimants of the property seized herein, by their attorneys, and on motion of said claimants by their attorneys leave is given them to file an amended answer herein.

And now, to wit, on the 15th day of November, A. D. 1877, come the said claimants of the said whiskey and alcohol, by Charles H. Reed and Edmund Jussen, their attorneys, and file by leave of court an amended answer, which is in the words and figures following, to wit:

Amended answer.—(Filed Nov. 15th, 1877.)

UNITED STATES OF AMERICA.

United States district court for the northern district of Illinois.

UNITED STATES OF AMERICA
v.
150 BARRELS OF WHISKEY AND OTHER PROPERTY,
Roelle & Junker & Co., claimants.

And the said claimants, by Charles H. Reed and Edmund Jussen, their attorneys, having first obtained leave of court for a further and amended answer in this behalf, come and defend the wrong and
19 injury when, etc., and say actio non, because they say that heretofore, to wit, on the 27th day of December, A. D. 1875, at Chicago, viz, at said northern district of Illinois, the said plaintiff and the said claimants entered into an agreement by which it was, among other things, agreed that if the said claimants, Joseph Roelle and Anton Junker, would testify in behalf of the plaintiff frankly and truthfully, when required, in reference to a conspiracy among certain government officials in the internal revenue service and other parties then known to exist, whereby the honest manufacture of distilled spirits and the collection of the tax thereon had been rendered practically impossible, and should plead guilty to one count in an indictment then pending against them in said district court, and should withdraw their pleas in certain condemnation cases then pending against their property in said district court, for the purpose only of insuring their good faith in so testifying on behalf of the plaintiff, the said plaintiff would recall any and all assessments under the internal revenue law then made against said claimants, and that no more assessments under said law should be made against said claimants, and that no more proceedings against said claimants should be commenced on account of violation of the Internal Revenue laws then passed, and that no penalties or forfeitures should in any manner be enforced or recovered against them and their property, and that all suits for penalties and forfeitures then pending against them and their property should be dismissed, and that full and complete immunity, both civil and criminal, should be granted to the said claimants.

And these claimants aver that the said Joseph Roelle and Anton Junker, and each of them, have fully and faithfully performed said contract, on their part, and they further aver that this suit is for the
20 condemnation and confiscation of their property originally seized by the said plaintiff on the ground of said alleged violation of the internal revenue laws on the part of the said claimants, alleged to have been committed by them prior to entering into said agreement, and is one of the suits which the plaintiff, under the terms of said agreement, fully kept and performed on the part of said claimants as aforesaid, agreed to dismiss and discontinue, and that the prosecution of this suit is contrary to and in violation of said agreement, entered into, as aforesaid, between the said plaintiff and said claimants; and this these claimants are ready to verify. Wherefore they pray judgment if the plaintiff ought to have his aforesaid action against them, etc.

CHA'S H. REED & EDMUND JUSSEN.
Att'ys for Claimants.

And now, to wit, November 16th, 1877, in the record of the proceedings of said court, in said cause, is the following entry, to wit:

Now comes the district attorney and now comes also the claimants, by their attorneys, and the claimants, by their attorney, move the court,

upon affidavit filed, to continue this cause, and, after hearing the arguments of counsel, the court overrules said motion.

And afterwards, to wit, on the 16th day of November, 1877, the attorney for the United States filed his demurrer to the plea, which is in the words and figures following, to wit:

Demurrer to plea.—(*Filed Nov.* 16, 1877.)

21 In the district court of the United States for the northern district of Illinois. October term, 1877.

THE UNITED STATES, ETC.,
v.
ONE HUNDRED AND FIFTY BARRELS OF WHISKEY, etc.

And Mark Bangs now, attorney of the said United States for the district aforesaid, who for the said United States in this behalf prosecutes, as to the plea of the said claimants in this behalf, called a further and amended answer, for the said United States says that the said plea and the matters therein contained in manner and form, etc., are not sufficient in law to bar the said United States, etc., and that he is not bound by law to answer the same, and this the said attorney, who prosecutes as aforesaid for the said United States, is ready to verify, wherefore for want of a sufficient plea in this behalf the said attorney, who prosecutes as aforesaid, for the said United States, prays judgment, etc.

MARK BANGS,
U. S. Attorney.

And now, to wit, November 17th, 1877, in the record of the proceedings of said court in the said cause is the following entry, to wit:

Now come the district attorney, and now come also the claimants, by their attorneys, and now comes on to be heard the demurrer of the complainant to the amended answer of the claimants filed herein on the 15th inst., and after hearing the arguments of counsel the court over-
22 rules said demurrer, and on motion of the district attorney, leave is given to file several replications herein.

And afterwards, to wit, on the 19th day of November, 1877, the attorney of the United States comes and files the following replication, which is in the words and figures following, to wit:

Replication.—Filed Nov. 19, 1877.

In the district court of the United States of America for the northern district of Illinois. October term, 1877.

THE UNITED STATES, ETC.,
v.
ONE HUNDRED AND FIFTY BARRELS OF WHISKEY, etc.

And the said attorney for the said United States, who for the said United States in this behalf now prosecutes, as to the plea of the said

claimants by them above pleaded, for the said United States says that by reason of anything in the said plea alleged, the said United States ought not to be barred, etc., because he says that the said United States did not agree with the said claimants in manner and form as they have above in their said plea alleged, and this the said attorney for the said United States who prosecuted as aforesaid for the said United States prays may be inquired of by the country, etc.

And for a further replication to the said plea of the said claimants, by leave of the court, etc., the said attorney for the said United States, who prosecutes as aforesaid for the said United States, says that they ought not to be barred, etc., because he says that the said claimants
23 have not fully and faithfully performed the said alleged contract on their part in manner and form as they have above in their said plea alleged, and this the said attorney for the said United States, who prosecutes as aforesaid for the said United States, prays may be inquired of by the country, etc.

And for a further replication to the said plea of the said claimants, by leave of the court, etc., the said attorney for the said United States, who prosecutes as aforesaid for the said United States, says, that they ought not to be barred, etc., because he says that this suit is not one of the suits which the said United States, under the terms of the said alleged agreement, agreed to dismiss and discontinue in manner and form as the said claimants have above in their said plea alleged, and this the said attorney for the said United States, who prosecutes as aforesaid for the said United States, prays may be inquired of by the country, etc.

MARK BANGS,
United States Attorney.

And now, to wit, April 20, A. D. 1878, in the record of the proceedings of said court in said cause, is the following entry, to wit:

Now come the parties, by their attorneys, and on motion of the district attorney leave is given the plaintiff to withdraw all replications heretofore filed to the plea of the respondents herein, and file a demurrer to said plea.

And afterward, to wit, on the 9th day of May, A. D. 1878, the attorney of the United States comes and files the following demurrer to
24 plea, which is in the words and figures following, to wit:

In the district court of the United States of America for the northern district of Illinois. May term, 1878.

THE UNITED STATES, ETC.,
v.
ONE HUNDRED AND FIFTY BARRELS OF Whiskey, etc.

And Mark Bangs now, attorney of the said United States for the district aforesaid, who for the said United States in this behalf prosecutes, as to the plea of the said claimants in this behalf called a further and amended answer, for the said United States says that the said plea and the matters therein contained in manner and form, etc., are not sufficient in law to bar the said United States, etc., and that he is not bound

by law to answer the same, and this the said attorney who prosecutes as aforesaid for the said United States is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said attorney who prosecutes for the said United States prays judgment, etc.

MARK BANGS,
U. S. Attorney.

And now, to wit, June 12th, A. D. 1878, in the record of the proceedings of said court in said cause is the following entry, to wit:

Now comes the district attorney, and the claimants of said property, Joseph Roelle, Anton Junker, and John P. Kissenger, come also, by Edmund Jussen and Charles H. Reed, their attorneys, and the court being now fully advised as to the demurrer of the United States
25 to the plea filed herein (alleging that claimants had been used as witnesses by the United States in criminal transactions against their accomplices, and had, thereby, become entitled to immunity from forfeiture, prayed in this case by reason of agreement made with the United States), heretofore submitted to the court upon the arguments of the district attorney, and the arguments of the attorneys for said claimants, doth find, both from the admissions made by said demurrer and also from facts appearing upon the records, and within the judicial knowledge of the court, that said claimants were used as witnesses by the government in criminal cases against their associates upon the promise and understanding that this case should no further be prosecuted.

It is thereupon ordered by the court that said demurrer be overruled, and this case is dismissed, both by reason of the defense set up in said plea, and also because of the finding of the court from the facts appearing on the record and within the judicial knowledge of the court that this cause ought to be no further prosecuted by the plaintiffs. And thereupon the United States, by Mark Bangs, district attorney, pray an appeal to the circuit court, which is allowed.

26 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings had in the cause, wherein The United States of America, by information, were complainants, and One hundred and fifty barrels of whiskey and one hundred barrels of alcohol was defendants, Roele, Junker & Co. claimants, as the same appears from the original thereof now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Chicago, this 18th day of June, A. D. 1878, and of our Independence the 103rd year.

[SEAL] W'M H. BRADLEY, *Clerk.*

(Endorsed:) Filed June 22, 1878. W'm H. Bradley, clerk.

27 And afterwards, to wit, on the 30th day of September, A. D. 1878, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

THE UNITED STATES OF AMERICA
v.
ONE HUNDRED AND FIFTY BARRELS OF Whisky and One hundred Barrels of Alcohol.

This cause having heretofore been set down for hearing upon the record from the district court, and heard and taken under advisement, and the court having considered and being now sufficiently advised in the premises, affirms the judgment of the district court herein. It is thereupon considered by the court that this cause be dismissed.

28 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein The United States of America is the plaintiff and One hundred and fifty barrels of whisky and one hundred barrels of alcohol are the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 9th day of October, A. D. 1878, and of our Independence the one hundred and third.

[SEAL.] W'M H. BRADLEY, *Clerk.*

29 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between the United States of America, plaintiffs, and One Hundred and Fifty Barrels of Whiskey and other Property, defendant, and Joseph Roelle, Anton Junker, and John P. Kissinger, claimants, a manifest error hath happened, to the great damage of the said The United States of America, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1878, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirtieth day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103d year.

[SEAL.] WM. H. BRADLEY,
Clerk.

(Indorsed:) No. 975. Supreme Court of the United States. 1878. October term. United States of America vs. One Hundred & Fifty Barrels of Whiskey & other Property, Joseph Roelle et al., claimants. Writ of error. Filed 15th November, 1878.

30 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To Joseph Roelle, Anton Junker, and John P. Kissinger, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the United States ofAmerica is plaintiff and One Hundred and Fifty Barrels of Whisky and other Property is defendant, and Joseph Roelle, Anton Junker, and John P. Kissinger, claimants, to show cause, if any there be, why the errors in said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge, this 10th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

H. W. BLODGETT,
Judge.

I hereby accept service of the within writ of citation, and enter the appearance of the within-named Joseph Roelle, Anton Junker, and John P. Kissinger, claimants.

Chicago, Oct. 10, 1878.

CHAS. H. REED & EDMUND JUSSEN,
Att'ys for Claimants.

I have served the within writ of citation upon Charles H. Reed, attorney of record for the within-named claimants, Joseph Roelle, Anton Junker, and John P. Kissinger, by personally delivering a true copy of the same to said Reed on this 10 day of October, A. D. 1878. I also served personally the same on Edward Jussen, one of the attorneys, by reading the same to him this 10 day of October, A. D. 1878.

J. S. HILDRUP,
U. S. Marshal.
D. D. SABIN,
Deputy.

Marshal's fees, 2 service', 4.00.

(Indorsed:) No. 975. Supreme Court of the United States. 1878. October term. The United States of America vs. One Hundred and Fifty Barrels Whisky, etc. Citation to October term, A. D. 18 . Filed 15 November, 1878.

(Indorsement on cover:) No. 975. The United States, plaintiffs in error, vs. One Hundred & Fifty Barrels of Whisky, Joseph Roelle & al., claimants. N. Illinois C. C. U. S. Filed 12th November, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

THE WHISKY CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

THE WHISKY CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

THE WHISKY CASES

1. The United States *vs.* Ford *et al.*, No. 930; debt, for the recovery of the double-tax penalty under sections 3296 and 3452 R. S.; $5,000.

2. The United States *vs.* Ford *et al.*, No. 929; debt, for recovery of the double-tax penalty under sections 3296 and 3452 R. S.; $12,000.

3. The United States *vs.* 400 Barrels Distilled Spirits, etc., Roelle, Junker, *et al.*, claimants, No. 934; appeal from district court; information under sections 3453, 3281, and 3299 R. S.; property appraised at $16,000.

4. The United States *vs.* 150 Barrels Whisky, etc., Roelle, Junker, *et al.*, claimants, No. 975; appeal from district court; information under sections 3281 and 3299 R. S.; property appraised at $16,994.

5. The United States *vs.* 400 Packages Distilled Spirits, R. C. Mersereau, claimant, No. 935; appeal from district court; information under sections 3281, 3299, and 3453 R. S.; property appraised at $28,000.

6. The United States *vs.* One Still, etc., Ford *et al.*, claimants, No. 931; appeal from district court; informa-

tion under sections 3299 and 3453 R. S.; property appraised at $18,240.98.

7. The United States *vs.* 319 Barrels Whisky, etc., Roelle, Junker, *et al.*, claimants, No. 933; appeal from district court; information under section 3453 R. S.; property appraised at $24,005.20.

8. The United States *vs.* 50 Barrels Distilled Spirits, Ford *et al.*, claimants, No. 932; appeal from district court; information under sections 3281, 3299, 3453, and 3456; property appraised at $3,000.

These actions are for the recovery of penalties and for forfeitures under sections 3296, 3452, 3453, 3281, 3299, and 3456 Revised Statutes. The same defense substantially is set up in all the cases.

The plea is as follows: I take it from the record in case of the United States *vs.* 150 Bbls. Whisky and 100 Bbls. Alcohol, Roelle, Junker & Co., claimants, No. 975:

"That on the 27th day of December, A. D. 1875, at, etc., the said plaintiff and the said claimants entered into an agreement by which it was, among other things, agreed that if the said claimants, Joseph Roelle and Anton Junker, would testify in behalf of the plaintiff, frankly and truthfully, when required, in reference to a conspiracy among certain government officials in the internal-revenue service and other parties, then known to exist, whereby the honest manufacture of distilled spirits and the collection of the tax thereon had been rendered practically impossible, and should plead guilty to one count in an indictment then pending against them in said district court, and should withdraw their pleas in certain condemnation cases then pending against their property in said district court, for the purpose

only of insuring their good faith in so testifying on behalf of the plaintiff, the said plaintiff would recall any and all assessments under the internal-revenue law then made against said claimants; and that no more proceedings against said claimants should be commenced on account of violations of the internal-revenue laws then passed; and that no penalties or forfeitures should in any manner be enforced or recovered against them and their property; and that all suits for penalties and forfeitures then pending against them and their property should be dismissed; and that full and complete immunity, both civil and criminal, should be granted to these claimants.

"And these claimants aver that they, the said Joseph Roelle and Anton Junker, and each of them, have fully and faithfully performed said contract on their part; and they further aver that this suit is for the condemnation and confiscation of their property originally seized by the said plaintiff, on the ground of said alleged violation of the internal-revenue law on the part of said claimants, alleged to have been committed by them prior to entering into said agreement."

In other words, the agreement pleaded is that in consideration of the defendants testifying for the government against other criminals, their co-conspirators in defrauding the revenue, they should have a full and complete discharge not only from all criminal liability, but from all penalties and forfeitures they have incurred, and even from liability for taxes upon the alcoholic liquors which they had attempted fraudulently to screen from taxation: they should be better off than if they had never offended.

The United States demurs to this plea:

First, the plea is bad on demurrer because it is too general. It does not set forth in "traversable form" the agreement relied upon. It does not state specifically by whom—by what officer or officers representing the government—the alleged agreement was made with the defendants.

The plea avers that the plaintiff, that is, the United States, entered into an agreement. Now the United States acts by a multitude of agents in carrying on the operations of the government, and where any act of the United States is alleged in pleading, the name of the officer through whom the act was done, the office he holds, and his authority to do the act, must be specifically set forth. This is plainly necessary to enable the plaintiff to take issue upon the plea. In Bean *vs.* Beckwith (18 Wall., 515) the court holds this language: "If a defendant has cause of justification for an alleged trespass, and undertakes to plead it, he must set it forth in its esential particulars, so that the plaintiff may be apprised of its nature, and take issue upon it if he desires, and so that the court may be enabled to judge of its sufficiency."

I submit that the same rule is applicable to the plea in these cases, wherein the defendants, accused of violating statutory enactments, set up an act of the government in their defense.

Secondly. It is bad, because the officers representing the government in these prosecutions had no authority to make the agreement pleaded. It was void, and the court could not enforce it.

I am aware that the plea alleges that "the plaintiff"—the United States—entered into this agreement with the defendants; but all that is meant, all that the court can understand, from this averment is, that certain sub-

ordinate officers of the government, who managed the prosecutions against the members of the combination known as the "Whisky Ring" of Chicago, agreed with the defendants as set forth in the plea.

It cannot be presumed that the Chief Executive, the President, in whom alone, as I shall show, is the power to grant immunity from the consequences of crime, was consulted or had any knowledge of the alleged agreement, so that it can be said that *the government* promised immunity. The power to grant immunity cannot be delegated.

In all suits instituted in behalf of the government the name "United States" is used as the name of the plaintiff. These suits are instituted, carried on, and prosecuted by United States district attorneys or by counsel specially authorized according to law. The stipulations and agreements of these officers, *when within the authority rested in them by law*, are binding upon the government; not so when they assume to exercise the powers of higher officers, even that of the Chief Executive.

No authority to bind the government by a promise of immunity is given to the public prosecutor by the common law nor by the statutes of the United States. The power to remit forfeitures of property seized under the internal-revenue laws is given with certain restrictions to the Secretary of the Treasury (Rev. Stats., § 3461); and the power to *compromise* civil or criminal cases under the internal-revenue laws is conferred upon the Commissioner of Internal Revenue, the approval of the Secretary of the Treasury being required in all cases, and the recommendation of the Attorney-General where suits have been commenced (Rev. Stats., § 3229). Even

these high executive officers are not authorized to grant complete immunity to offenders.

The alleged agreement, therefore, being without warrant of law, is void, and could not be made the foundation of any order or judgment of the court.

But, again, it is immaterial whether promises were made to the defendants, or by whom they were made. The rights of accused parties who are admitted to give evidence for the state against their accomplices are fixed by law. All the benefit they can derive from turning state's evidence, to use the common phrase, is an equitable claim to be recommended by the court to the President for a pardon. Immunity is a consequence of pardon. The power to pardon, and thereby grant immunity for the consequences of crime committed, is given by the Constitution to the President alone. The courts cannot exercise the power or trench in any manner or to any extent upon this prerogative of the President. There cannot be immunity before pardon.

The leading case on this subject is that reported in 1 Cowp., 331, also reported 1 Leach, C. L., 115, and known as Rudd's case. It is familiar, and I need not state the facts, but I will quote one or two passages from Lord Mansfield's judgment.

After stating (1 Cowp., 334) three ways "in law and practice which give accomplices a *right* to a pardon" (by none of which ways do the defendants approach the court), he proceeds:

"There is, besides, a *practice*, which indeed does not give a legal right, and that is where accomplices, having made a full and fair confession of the whole truth, are, in consequence thereof, admitted evidence for the Crown, and that evidence is afterward made use of to convict

the other offenders. If, in that case, they act fairly and openly, and discover the whole truth, though they are not entitled *of right* to a pardon, yet *the usage*, the lenity, and the practice of the court is to stop the prosecution against them, and they have an equitable title to a recommendation for the King's mercy."

Further on (1 Cowp., 336) he speaks of it as "a kind of HOPE that accomplices who behave fairly and disclose the whole truth and bring others to justice should themselves escape punishment and be pardoned. This is in the nature of a recommendation to mercy. But no authority is given to a justice of the peace to pardon an offender, and to tell him he shall be a witness against others. The accomplice is not assured of his pardon; but gives his evidence *in vinculis*, in custody. And it depends on the title he has from his behavior whether he shall be pardoned or executed. A justice has no authority to select whom he pleases to pardon or prosecute, and the prosecutor himself has even less power, or rather pretense to select, than the justice of the peace.

"It rests, therefore, on *usage*, and on the offender's own good behavior, whether he shall be prosecuted or not. And if, in a proper case, an application was to be made to this court by an accomplice to be bailed, that is, in the case of a person properly within the usage, and who has fully complied with the requisite conditions, I should have no difficulty in bailing him, IN ORDER THAT HE MIGHT APPLY FOR THE KING'S PARDON."

Afterwards the case was submitted to the consideration of the twelve judges. Aston, justice, delivering the judgment of all the judges, says (1 Cowp., 339) that an accomplice who is admitted to give evidence for the state, and fully and truly discloses the joint guilt of

himself and his companions, &c., "*cannot by law plead this in bar* to any indictment against him, nor avail himself of it upon his trial; for it is merely an equitable claim to the mercy of the Crown from the magistrate's express or implied promise of indemnity upon certain conditions that have been performed. *It can only come before the court by way of application to put off the trial, in order to give the prisoner time to apply elsewhere.*"

The doctrine of this case has been followed to this day both in England and in this country.

In Rex *vs.* Garside (2 Ad. & E., 266) Lord Denman, after commenting upon the judgment of Lord Mansfield in Rudd's case, held that even the King's proclamation did not give to the prisoner, who claimed to have complied with the terms of it, a legal right, in the strict sense, to the benefits of a pardon—such a right (2 Ad. & E., 275) "as would constitute a defense to an indictment, or an answer to the question why execution should not be awarded." And in awarding execution (2 Ad. & E., 276), the court only gave such time that, if the prisoner could bring himself within the King's proclamation, he might be enabled to benefit by it, by applying for a pardon.

Mr. Justice Wayne, delivering the judgment of the court in *Ex parte* Wells (18 How., 307), quotes a passage from Chief Justice Marshall, in United States *vs.* Wilson (7 Peters, 159): "As the power has been exercised (18 How., 310–11) from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the *operation and effect* of a pardon, and look into their books for the rules prescribing the manner in which it is to be

used by the person who would avail himself of it." And on page 312, in the Wells case, the court, after citing Rudd's case and stating the three ways by which pardons may be obtained of common right, proceeds thus:

"But, except in these cases, accomplices, though admitted according to the usual phrase to be 'king's evidence,' have no absolute claim or legal right to a pardon. But they have an equitable claim to pardon if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made. He cannot plead it in bar of an indictment for such offense, but he may use it to put off the trial, in order to give him time to apply for a pardon."

In The People *vs.* Whipple (9 Cowen, 707) it is said by Duer, chief justice (9 Cowen, 716), that the authority of the court extends no further than the recommendation to mercy; it must after all rest with the executive whether that recommendation be complied with or not. (See also United States *vs.* Lee, 4 McLean, 103.)

These authorities are conclusive. It is clear from them that an accomplice admitted to give evidence for the state, who testifies fully, honestly, and truthfully, has a strong equitable claim upon the prosecutor and upon the court to be recommended to the mercy of the President; but he cannot plead this claim in bar of an indictment or of any action growing out of the offense of which he is guilty. Before pardon it is no defense; and no promise of a pardon prior to the actual issue of a charter of pardon can be pleaded to the action.

But, again, the issue upon a plea founded upon a *promise* of immunity is an immaterial issue. The plea would be bad upon motion in arrest of judgment. The mere promise is not a thing of which the court can take

cognizance as matter of defense. Let it be supposed that the President did actually promise to pardon these defendants. The promise is not pardon itself, nor its equivalent. The court cannot undertake to say what is in the mind of the President, and to carry out his supposed intentions; much less can the court say what *ought* to be done by the Executive. *Non constat* but there may be in the executive mind valid objections to granting pardon, such as non-compliance with the conditions on which it was promised; and other objections may be conceived. But whether for good reasons or without reason, these defendants have not been pardoned, although they have had ample time and opportunity to make application for it. Now, can the court here interpose and say the promise ought to be fulfilled, and therefore we will, by our judgment, give to the defendants all the benefits of pardon; whether the President will or no, the effects and consequences of pardon shall be enjoyed. This court will not thus assume to exercise executive power. It would be to confound and obliterate the distinctions clearly marked out in the Constitution between the powers of the co-ordinate departments of the government. It is said by the court in United States *vs.* Klein (13 Wall., 147): "It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be in its sphere independent of the others. To the executive alone is intrusted the power of pardon, and it is granted without limit."

The court below should not have even *considered* the evidence of the alleged promise. In King *vs.* Garside, *supra*, Lord Denman refused to look into the particular

circumstances of that case to see whether or not under the King's proclamation the prisoner was entitled to mercy. These circumstances, he said (Rex *vs.* Garside, 2 Ad. & E., 276), "may be properly looked into by the secretary of state when he has to consider whether or not he shall recommend a pardon, but they cannot affect the decision of this court." In this case the prisoner, when brought up for sentence, pleaded *ore tenus* that he was entitled to pardon by the King's proclamation; that the King, by publication in the Gazette, had *promised* to pardon him, and set forth the terms of the proclamation and all the facts and circumstances which, as he contended, brought him within it. But the court declined to consider them. These were not matters proper in a plea to the court, but for an application to the executive, and time only was allowed "for the Crown, if it so thought fit, to *give effect to any contract that might have been entered into with the prisoner.*"

So that the defendants do not advance one step in their defense when they stop at the promise. They must produce the act of pardon before they can claim immunity.

Before I close I will advert for one moment to the reasons upon which the judgment of the district court in the six condemnation cases (affirmed by the circuit court) was founded. I quote from the order of the district court, found on page 21 of the record, in case No. 933:

"It is therefore ordered by the court that said demurrer be overruled and this case is dismissed, both by reason of the defense set up in said plea, *and also* because of the finding of the court from the facts appearing on the record and within the judicial knowledge of the court."

Now, it would be interesting to know what facts of record other than those set forth in the plea, and especially what other facts within the judicial knowledge of the court, *could be considered*, when only the question raised by the demurrer to the plea was before the court. It would seem that the court traveled out of the record, for upon demurrer only the facts admitted by it are properly within the knowledge of the court.

If the facts set forth in the plea constituted a good defense, what need of going outside of it for facts to support a judgment for the defendants upon the demurrer? For this is all that the issue called for. But the court rendered a judgment of dismissal, and thus practically decreed a pardon to the defendants; for, if sustained, the judgment carries with it all the effects of a pardon.

Now it has been shown above that it is not within the power of the judiciary to grant pardons, or by its judgments to extend immunity to offenders, and thus give them the benefits of pardon. No possible knowledge of the court could authorize it to go to this extent and grant what has been called in the discussion of these cases "a judicial pardon"—a thing unknown to the law. The President alone can pardon. The courts can recommend offenders to his mercy. When they have done that, they have gone to the extent of their power.

CHAS. DEVENS,
Attorney-General.

Supreme Court of the United States of America.

OCTOBER TERM, A. D. 1878.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
BURTON M. FORD ET AL.
No. 929. Debt for penalties.

SAME
vs.
SAME.
No. 930. Debt for penalties.

SAME
vs.
ONE STILL AND OTHER PROPERTY, BURTON M. FORD ET AL., CLAIMANTS.
No. 931. Forfeiture.

SAME
vs.
50 BARRELS OF DISTILLED SPIRITS, BURTON M. FORD ET AL., CLAIMANTS.
No. 932. Forfeiture.

SAME
vs.
319 BARRELS OF WHISKEY AND OTHER PROPERTY, JOSEPH ROELLE ET AL., CLAIMANTS.
No. 933. Forfeiture.

SAME
vs.
400 BARRELS OF DISTILLED SPIRITS, JOSEPH ROELLE ET AL., CLAIMANTS.
No. 934. Forfeiture.

SAME
vs.
400 PACKAGES OF DISTILLED SPIRITS, ROSWELL C. MERSEREAU, CLAIMANT.
No. 935. Forfeiture.

SAME
vs.
150 BARRELS OF WHISKEY, JOSEPH ROELLE ET AL., CLAIMANTS.
No. 975. Forfeiture.

Appeal by the United States from the United States Circuit and District Courts for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR CLAIMANTS AND DEFENDANTS IN ERROR.

EDMUND JUSSEN,
CHARLES H. REED,
Attorneys for Claimants and Defendants.

Supreme Court of the United States of America.

OCTOBER TERM, A. D. 1878.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
BURTON M. FORD ET AL.

No. 929.
Debt for penalties.

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SAME
vs.
400 PACKAGES OF DISTILLED SPIRITS, ROSWELL C. MERSEREAU, CLAIMANT.

No. 935.
Forfeiture.

SAME
vs.
150 BARRELS OF WHISKEY, JOSEPH ROELLE ET AL., CLAIMANTS.

No. 975.
Forfeiture.

APPEAL BY THE UNITED STATES FROM THE UNITED STATES CIRCUIT AND DISTRICT COURTS FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR CLAIMANTS AND DEFENDANTS IN ERROR.

These suits all involve the same question and principle.

A decision of one determines the others.

Penalties and forfeitures are governed by the same rules of law.

Such being the case, but one of the above suits was argued in the courts below, with the agreement that the same judgment should be entered in each.

The suit argued below was that of The United States *v.* 319 Barrels of Whiskey, and other property, No. 933 on the docket of this court.

The answers and pleas are substantially alike in each of these suits, and present the same question.

The law, facts, and history of these suits are clearly and correctly stated in the opinion of his honor Judge Blodgett. That opinion is as follows:

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS.

The United States, &c.,
v.
Three Hundred and Nineteen Barrels of Whiskey, and other property.

This is a proceeding by information filed on the 14th day of May, 1875, by the United States district attorney of this district, alleging that the property in question was found by the Collector of Internal Revenue of the First Collection District of this State in the possession of the

firm of Roelle, Junker & Co., at their rectifying house in this city, where the same was held by them, for the purpose of being sold and removed from said place, in fraud of the internal revenue laws of the United States, and with the design to avoid the payment of the tax thereon; whereby said property became forfeited to the United States. After the seizure and filing of the information, Roelle, Junker & Co. appeared as claimants, and filed pleas denying the right of forfeiture, which pleas were afterwards withdrawn, and on the fifteenth of November, 1877, they filed, by leave of court, an answer or plea alleging, in substance, that, after the seizure of said property and the filing of said information, they were indicted by the grand jury of this district for certain alleged frauds upon the internal revenue laws, committed by them as distillers and rectifiers of alcoholic spirits; and after said indictment they entered into an agreement with the United States, to wit, on the twenty-seventh day of December, 1875, whereby it was, among other things, agreed that if the said claimants, Roelle and Junker, would testify in behalf of the United States fully, frankly, and truthfully, when required, in reference to a conspiracy among certain government officials in the internal revenue service, and other parties, whereby the collection of the internal revenue upon distilled spirits in this district had been made practically impossible, and would also plead guilty to one count of the indictment then pending against them, and withdraw their defenses to proceedings then pending, to forfeit their property, (among which was the suit in question,) for the purpose of insuring their good faith in testifying in behalf of the government, that no penalties or forfeitures should be in any manner enforced against them *and their property*, and that all suits for penalties and forfeitures then pending against them *and their property* should be dismissed; and that full and complete immunity, both civil and criminal, should be granted to said claimants.

It is here averred that a plea of guilty was entered to one count of the indictment; that the pleas or answers in the forfeiture cases were withdrawn, and that said Roelle and Junker have fully and faithfully performed said agreement on their part; wherefore they pray judgment, &c.

To this plea or answer the government, by the district attorney, has demurred.

The rule is well settled, that a demurrer admits all facts which are well pleaded in the pleading demurred to, so that the only question raised by this demurrer is whether the facts alleged in this plea furnish the claimants a legal defense to this proceeding for forfeiture.

This court is judicially cognizant of many of the facts set up in this plea.

The indictment against the members of the firm of Roelle, Junker & Co. was found by the grand jury of this court. The plea of guilty to one count of the indictment was made at the bar of this court, and they withdrew their plea in this suit and permitted a default before this court, as is shown by the record. Roelle and Junker were called as witnesses by the government in criminal trials before this court against persons indicted and on trial for conspiracy to defraud the government of the tax on distilled spirits, produced at various distilleries in this district, and I think I do not exceed the bounds of judicial propriety in saying that it is my belief that the prosecution obtained convictions, in cases where these men were used as witnesses, mainly through their testimony. What the specific agreement was under which these men agreed to become State's witnesses, the court is only directly informed by this plea.

But I think the law is well settled, that when an accomplice turns State's evidence, or becomes a witness for the government in criminal or *quasi*-criminal cases, he thereby becomes *ipso facto* entitled to full immunity from prosecution for any and all the offenses to which he was a party with the accomplices against whom he testifies (United States *v.* Lee, 4 McLean, 103.) It has become a matter well established by the records of this court, that for several years prior to the seizure of the property in question, and up to about the time this property was seized, a most formidable conspiracy existed in this city and vicinity between distillers and rectifiers, revenue officials, and outside persons, for defrauding the government of a large percentage of the tax upon spirits produced in this locality, and that by the operations of this conspiracy the government had been defrauded of large amounts of revenue; and it was to get full information as to the extent and nature of this

conspiracy, and who were the parties to it, and to secure their punishment, that these men were used as witnesses.

I think, therefore, the court should presume, without regard to this plea, in view of the facts within its own knowledge, and shown by its own records, that these claimants testified upon the understanding that they were to receive full immunity from all punishment for any acts committed by them as members of this conspiracy. If they were to accept anything less than complete and full immunity, it would seem to be the government's plan to assert and show it. It is also shown, by the records of this court, that soon after the trials in which the claimants were used as witnesses, the criminal suit or suits against them were dismissed by the district attorney.

From time immemorial, it has been the practice of the courts of England and the United States to accept the evidence of *accomplices*, and to grant them immunity in some form for the offenses of which they and their associates stood charged.

The practice had its origin in what was known as *approvement*, which is defined by Blackstone as follows:

"But there is another species of confession which we read much of in our ancient books, of a far more complicated kind, which is called *approvement;* and that is, when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices, of the same crime, *in order to obtain his pardon.* In this case he is called an *approver* or *prover—probator;* and the party appealed or accused is called the appellee. Such approvement can only be in capital offenses, and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it; and if he hath no reasonable and legal exceptions to make to the person of the *approver*, (which, indeed, are very numerous,) he must put himself upon his trial, either by *battle* or by the country; and if vanquished, or found guilty, must suffer the judgment of the law, and the approver shall have his pardon, *ex debito justitia.*" (4 Black. Comm., 330.)

This practice, in process of time, became obsolete in England. There was substituted for it the practice of accepting the evidence of accomplices in criminal cases, upon the express or implied understanding, that if they testified

fully and truthfully they were to receive a pardon. Of this modern usage, Blackstone says: "It hath also been usual for justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, King's evidence) against his fellows: upon an implied confidence which the judges of gaol delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and all other felonies to which he is examined by magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offense of the same degree." (4 Black. Comm., 331.)

So Lord Mansfield said in Rudd's case (Cowp., 336): "If an accomplice act fairly and openly, and discover the whole truth, although he is not entitled of right to a pardon, yet the usage and practice and lenity of the court is to *stop the prosecution against him*, and he has an equitable title to a recommendation to the King's mercy; it holds out a hope that the accomplices so conducting themselves and bringing others to justice shall themselves escape punishment and be pardoned."

Formerly, in the English courts, when the prisoners, as a rule, had no attorneys, the judge determined beforehand upon proper inquiry, whether the public interests demanded that an accomplice should be allowed to become King's evidence, and if he decided to allow him to do so, he was pardoned, as a matter of course, upon the judge's recommendations.

This is clearly established in Rudd's case, above referred to. (*People* v. *Whipple*, 9 Cow., 207; *United States* v. *Lee*, 4 McLean, 103; 3 Greenleaf's Evidence, sec. 379; Roscoe's Crim. Ev., 132.)

In more recent times, since the practice has become fixed and general that persons charged with criminal offenses are provided with attorneys to conduct their defense, either by themselves, if they are able to do so, and if not, then by the assignment of some competent attorney by the court, and the government is represented by a proper officer, charged with that duty under the law, the terms upon which an accomplice is allowed to testify are usually settled between the attorney for the government and the accomplice or his attorney; so that the court, as a matter

of fact, rarely knows, until the trial is concluded, the terms upon which the testimony was accepted, or the facts which the accomplice proposed to disclose; but when the trial is finished, if the witness has acted fairly, the public prosecutor or government attorney enters a *nolle prosequi*, or strikes the case from the docket, of his own motion, and without any question by the court or public of his right to do so. So that, as the result of well-established usage for centuries, both under the common law and statutes of England, and in this country under our written Federal and State Constitutions and statutes, the courts have come to exercise a power of judicial condonation toward offenders who become State's evidence which, in its practical operation and effect, is co-extensive with an Executive pardon,—that is, all prosecutions for punishment are dismissed and abandoned as against him.

In fact, so far as I can ascertain, the practice in the criminal courts throughout the United States is for the public prosecutor to practically control the whole matter of granting immunity to accomplices who are used as State's evidence, without reference to the executive, and only to the courts where the question of the witness's good faith and truthfulness in testifying is raised, the witness being all the time, as it were, in the hands of the court, and with the right to appeal to the court for protection, if, for any reason, the government attorney refused to dismiss the case or insisted upon a trial. (4 McLean, 103.)

The revenue laws relating to the production of alcoholic spirits contain many stringent provisions, intended to secure the payment of the tax on all spirits produced.

The violators of these provisions are subject to indictment, fine, and imprisonment by the criminal courts. Their property used in the violation of the laws is made forfeitable to the government, and heavy penalties may also be collected from them by suits.

Besides this, they are liable for the tax on all spirits illicitly produced, which may be collected by assessment and levy on their non-forfeitable property, or by suit on their distiller's bond. The liability to indictment, fine, and imprisonment, and to the forfeiture of their property used for illicit purposes, or found on premises used for illicit purposes, and to penalties for violations of law, are all in the nature of *punishments*, and, in my estimation, it

makes no difference whether these *punishments* are to be enforced in the civil or criminal courts. They are all intended to accomplish one end and purpose, and that is, to *punish the offender for disobedience of the law.* And when an offender against these laws becomes State's evidence, I think he entitles himself to immunity from the criminal and *penal* clauses of the law he and his accomplices have violated.

The methods of enforcing these criminal and penal provisions of the law are substantially the same, although not upon the same side of the court's docket.

They are prosecuted by the district attorney, and, in nearly all cases, may be enforced, either by information on the criminal side of the court, or by information on the instance docket. In all cases, they are *public prosecutions* for violations of the law of the land.

This principle has been fully recognized by the Supreme Court of the United States in a series of cases growing out of the late rebellion.

In Armstrong's case, 6 Wall., 766, it was contended by the Attorney-General that a pardon by the President of the United States for acts of treason did not relieve the property of the traitor from forfeiture, but the court held that the pardon relieved the person pardoned from all forfeitures and penalties which accrued to the United States. The same doctrine was asserted in *United States* v. *Tuddleford*, 9 Wall., 531. In *Carlisle* v. *United States*, 16 Wall., 147, the court said: "The pardon not merely releases the offender from punishment prescribed for the offense, but obliterates, in legal contemplation, the offense itself." The same rule was reiterated in *Osborn* v. *United States*, 1 Otto, 474, but the latest and perhaps the most distinct enunciation of this principle is found in *Knote* v. *United States*, 5 Otto, 149.

There, a citizen who had been guilty of treason in the late rebellion, and who had been pardoned by the President's proclamation, applied for the restoration of the proceeds of his property, which had been confiscated to the United States for his acts of treason. The law makes treason a crime punishable by death, and also by confiscation of the property of the traitor, and yet the court held that the pardon would have relieved the traitor from all the consequences of his treason, both those enforcible on the

criminal and civil sides of the courts, but for the fact that the confiscation had been accomplished and the money covered into the Treasury before the pardon.

In the case at bar, the admissions upon the record by the demurrer, and the facts within the judicial knowledge of the court, show that the government has so dealt with these claimants as to leave no doubt but that they testified against their accomplices, with the understanding that they should receive full immunity from punishment for their part in the conspiracy; and the plainest dictates of honesty, fair dealing, and public policy demand that the court shall see to it that the promise of immunity shall be kept. To do otherwise, might, at this time, subject the claimants to gross injustice in this case. They had put in a defense denying the right of the government to a forfeiture of this particular property, and the court cannot tell but what they might have been able to make that plea good. They may have been members of the "*Whiskey Ring*," and parties to the organized conspiracy, and yet it does not necessarily follow that the government had a right to the forfeiture of this property. They might have been able to explain all the suspicious circumstances which led to the seizure, but after the lapse of so much time their witnesses may be dead or beyond reach, or the explanatory facts forgotten, so that a complete and successful defense may have been waived or abandoned by these claimants on the faith of the promise of immunity made.

The difficult question with me has been as to the proper practice or method of asserting this promise of immunity as a matter of defense in this case. There is no doubt that if a pardon in general terms had been granted the claimants for the offenses named in the indictment found against them, they could have plead it in bar to this proceeding to forfeit their property.

But so far as the adjudged cases have yet gone, it would seem that the *promise* of immunity, on condition that the witness testify fully and truthfully, only created an *equitable* right to a pardon which, it is presumed, the Executive, on proper application, will grant; and the court, therefore, continues the case until the Executive shall act in the matter.

Certainly a court knowing that a party to a suit brought by the government against him had become, ex debito justitia, entitled

to a pardon or to the entry of a nolle prosequi in his case, would not permit judgment to be taken against him after his own plea of guilty.

The court may, therefore, refuse to try the case, on the ground that the government has, by its dealings with the defendant, lost the right to try it.

So, also, if I am right in my conclusions as to the present status of the law on this subject, that by immemorial usage and practice an accomplice who becomes State's evidence acquires a right to what may be called judicial condonation or pardon, *then the courts can direct the dismissal of the cause on the ground that it ought to be no farther prosecuted.*

Were this the only case involving the principle raised by this plea, I should deem it sufficient to refuse to try the case, for the reason, as Lord Mansfield said in Rudd's case, that the claimants have acquired the right to have the court "*stop the prosecution against them.*"

But as there is a large amount of property involved in this and various other seizures, all depending upon the same question, I have thought it better, in order that my conclusions as to the law may be reviewed, if the government wishes to review them, that I, upon the facts found and admitted upon the record, overrule the demurrer, and order this case dismissed—not merely because I think the facts stated in the plea and confessed by the demurrer make a defense, but because, as I have already said, from facts within the knowledge of the court, I think this case ought not to be farther prosecuted.

It may be proper, in making this order, that I should also add that I think there is a clear distinction between *punishments* or *penalties* incurred for violations of the revenue laws, and liability for taxes on spirits produced. The fines, forfeitures, and penalties may be remitted or waived by the operation of a pardon or the promise of immunity, but the law makes a distiller liable for the tax on all spirits produced, and the tax attaches as soon as the spirits come into existence as such. And I much doubt whether it is in the power of any branch of the government, except Congress, to remit or release this tax.

The demurrer is overruled, and the suit dismissed.

An appeal was taken from this decision to the Circuit Court, and the suit argued before Mr. Justice Harlan, who

affirmed the judgment of the District Court, as is shown by the record.

In order to show that suits to recover penalties or forfeitures are in substance and fact criminal, although civil in form, we refer to the following cases and authorities. Chitty, in his Treatise on Criminal Law, page 134, (side page 163,) in speaking of cases where indictment is a proper remedy, says: "Although it would be foreign to our present design to enter into the cases in which this proceeding can or cannot be supportable, it may be proper to observe, in general, that where a statute prohibits an act to be done under a certain penalty, though no mention is made of indictment, the party offending may be indicted and fined to the amount of the penalty."

In *Hibbard* v. *People*, 4 Michigan, p. 126, the question was whether a certain law which provided for "the seizure and confiscation of intoxicating liquors" was constitutional. On page 129, the court say: "That this is clearly a criminal proceeding, within the meaning of the Constitution, one can entertain no doubt. It is instituted for the purpose of forfeiting property, on the ground that it is kept for an illegal and criminal purpose. It makes no difference in its character, that the form of the proceeding for the recovery of the pecuniary penalty or forfeiture, is assimilated to that of a civil action. The issue is guilty or not guilty, and the penalty is imposed as a punishment for an offense."

In *U. S.* v. *Gates*, 8 Law Reporter, the court said (at p. 468): "That the act of 1799, section 50, prohibits the landing of goods, &c., under a penalty, and, moreover, demonstrates it an offense. Ordinarily, mere statutory penalties are to be sued for, and recovered by action of debt. But information will also lie when no method is prescribed by the statute for recovery of the penalty (*Adams* v. *Wood*, 2 Cranch, 336); but it would seem that the party may, at the election of the government, in place of a suit, be indicted

and bound to the amount of the penalty, unless the special mode of remedy is pointed out by the statute."

In *Green* v. *Briggs*, 1 Curtis C. C., (which was a proceeding *in rem* to forfeit some liquors,) Judge Curtis, at page 328, said: "These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine and imprisonment, and at the same time to adjudicate a forfeiture of his liquors."

On page 331, he said: "It is urged, however, that nevertheless this may be a valid proceeding against the property, although the court could not thus convict the person. If this were simply a proceeding to forfeit the property, it would nevertheless be a criminal prosecution within the meaning of this clause of the Constitution."

In *Fisher* v. *McGirr*, 1 Gray, (which was also a forfeiture case,) pages 26 and 27, Judge Shaw said: "Two distinct modes or courses of proceeding, both well known to the law, but of considerable difference in their modes of operation—the one, a proceeding *in rem* by the sequestration and forfeiture of the property or thing which is noxious in itself, or made the instrument of a noxious or injurious use; the other, a proceeding *in personam* for the punishment of the person of the offender, as an example to deter others from the commission of a like offense;—both are proceedings designed for the enforcement of the criminal law, and must be governed by the rules applicable to its administration.

In *Commonwealth* v. *Snelling*, 15 Pickering, Judge Shaw, (referring to statutes imposing penalties and forfeitures,) at page 330, said: "These are, in form, actions of debt; but they are to recover penalties, and are substantially criminal proceedings."

It is lawful for the government to accept an accomplice as a witness. If an accomplice is thus accepted, and testifies fully, fairly, and truthfully, the law gives him an implied promise of protection from prosecution or punishment

for the offense concerning which he thus testifies. This being the case, it necessarily follows that an express agreement made by the district attorney, who represents the government, that such an accomplice shall not be prosecuted or punished, is a lawful agreement which the court should recognize and enforce.

We are unable to find any reported case where such an agreement has been interposed as a defense and passed upon by the court.

We suppose the reason why no such case can be found, is because no such agreement has ever been questioned.

There are, however, two cases where this question was presented to some extent by insufficient pleas.

See *Commonwealth* v. *Brown*, 103 Mass., p. 422; and *Commonwealth* v. *Woodside*, 105 Mass., p. 594.

The plain inference from the decisions in those cases, is that the court would have decided such an express agreement a good defense.

Cases can be found where the courts have held that the *implied* promise of immunity, arising from the fact of an accomplice turning State's evidence, does not constitute a technical defense. But these cases are clearly distinguishable from the one now before the court. We plead and set out an express agreement that the claimants should not be prosecuted or punished, nor their property forfeited. The order dismissing these suits, entered by Judge Blodgett, was proper and lawful, as being the legitimate exercise of an inherent power of the court.

See *Dawkins* v. *Prince Edward*; *Same* v. *Wynyard*; *Same* v. *Stevenson*, 1 Queen's Bench, Division 499; *Castro* v. *Murray*, Law Reports, 10; Exchequer, 213.

We therefore submit that the judgments and orders of the District and Circuit Courts should be affirmed.

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